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November 18, 2019

VIA ELECTRONIC FILING
The Honorable Thomas J. Buck, J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, New Jersey 08903-0964

Re: Joao Abilio Silva v. Conti Enterprises, Inc., et als.
Docket No.: MID-L-7167-15
Our File No.: 15-94

Response to Defendant's Five-Day Order and Objection to the Request Contrary to Rules 1:2-1 and 1:38-11 to Make Secret the Public Jury Verdict Announced in Open Court

Dear Judge Buck:

We represent plaintiffs in the above matter. Please accept this response to the November 11, 2019 letter of counsel for Jacobs Engineering Group, Inc. ("Jacobs") and their proposed Five Day Order. We object to the highly unusual, extraordinary, and after-the-fact request to make this public jury verdict announced in open court, a secret. Jacobs was expecting a no cause verdict and it was not until after they lost they tried to get it sealed. Jury verdicts are public record and comprehensive research has not revealed a single instance where a civil injury jury verdict was sealed. Even in the *Verni* case where there was a concern an estranged father would take monies awarded to a disabled child, the Appellate Division reversed a trial court order sealing the verdict.

I. It Is Extraordinary, Highly Unusual, and Against *Rules* 1:2-1 and 1:38-11(b) and Case Law to Make the Public Jury Verdict Announced in Open Court a Secret

Keeping civil damage jury verdicts a secret is highly unusual and extraordinary. Indeed it seems it is almost never done. *Rule* 1:2-1 is clear:

> All trials, hearings of motions and other applications, first appearances, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute. If a proceeding is required to be conducted in open court, no record of any

portion thereof shall be sealed by order of the court except for good cause shown, as defined by *R.* 1:38-11(b), which shall be set forth on the record.

Rule 1:2-1 (underline added). There is no such rule or statute applicable, much less proffered by Jacobs. *Rule* 1:38-11(b), "Sealing of Records" states:

> (b) Good cause to seal a record...shall exist when:
>
> > (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
> > (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38.

It is the moving party's burden to prove the above burden to justify sealing court records. *R.* 1:38-11(a). Here there was no motion filed by Jacobs. There was nothing to support the burden set forth under the Rules. There was simply a request for it after they found out they lost. Jacobs' drastic and extraordinary baseless request to seal the verdict should be denied.

New Jersey Courts have a long, well established, and critically important tradition of transparency and openness. As such, under the Rules there is a strong presumption that public records including jury verdicts must be available for public inspection and should not be kept secret. *Rule* 1:2-1; *Rule* 1:38-11(b) *See, e.g. Hammock by Hammock v. Hoffman-LaRoche, Inc.*, 142 *N.J.* 356, 379 (1995) (holding "as a matter of public policy there must be careful scrutiny prior to sealing records and documents filed with a court in a high public-interest case"); *Smith v. Smith*, 379 *N.J. Super.* 447, 456 (Ch. Div. 2004) (holding personal interest in keeping reputation private does not suffice to overcome strong presumption of open judicial proceedings); *Verni ex rel. Burstein v. Lanzaro*, 404 *N.J. Super.* 16, 20 (App. Div. 2008) (holding court proceeding may only be sealed to protect a substantial interest, and plaintiff's interest in privacy does not amount to a substantial interest).

Indeed, axiomatic to a free and democratic society is the principle the public should have access to the Courts and knowledge of the proceedings taking place therein. *N.J. Div. Of Youth & Family Servs. v. J.B.*, 142 *N.J.* 112, 127 (1990) (acknowledging the First Amendment, the history of this State and our Court Rules require that civil proceedings shall be open to the public unless "an important state interest is at stake."); *Publicker Industries, Inc. v. Cohen*, 733 *F.2d* 1059, 1070 (3d Cir. 1984) (holding a trial court abused its discretion in closing judicial proceedings and denying appellants' right of access to civil proceedings. Further, the First Amendment secured to the public and to the press a right of access to civil proceedings).

In that regard, if a party seeks to keep a verdict confidential, it is their burden to show why the verdict should not be part of the public record. This is a substantial burden under a very narrow standard set forth under Rules 1:2-1 and 1:38-11. Simply wanting to avoid embarrassment or retain

the privacy of what happened during a trial is not grounds to seal a verdict. *Verni*, *supra*, 404 *N.J. Super.* at 24 ("A personal interest in privacy and freedom from annoyance and harassment, while important to the litigant, will not outweigh the presumption of open judicial proceedings even in relatively uncomplicated and non-notorious civil litigation.") (emphasis added). In order to seal the verdict, Defendants must demonstrate a clearly defined and serious injury will occur if the verdict is not sealer, or their interest in privacy substantially outweighs the presumption all court proceedings are public record. *R.* 1:38-11(b). No such showing was made or can be made in this public safety rules violation case. Neither was a finding of these elements made by the Court. This is an extraordinary and unprecedented measure which has no basis in the facts nor Rules.

The fact that Jacobs wanted to wait to see if it won as it expected to before it made the request, does not fit into the narrow requirements of *Rule* 1:38-11(b). Neither does the fact that it lost. The public interest in knowing a contractor the public hired on a public job failed in what it agreed and was paid taxpayer money to do, far outweighs Jacobs' self-serving interest in keeping the public in the dark. *R.* 1:38-11 (b); *Hammock*, *supra* 142 N.J. at 375-76 (providing the party who seeks to keep court records confidential has the burden to overcome the strong common law presumption of access to court records, and must show by a preponderance of evidence the interest in secrecy outweighs the presumption). The public has a right to know a contractor it paid $17,000,000 did not live up to what it agreed.

There is a strong presumption of public access to documents, materials and results associated with civil litigation. *See Verni*, *supra* 404 N.J. Super. at 25 (holding an order sealing proceedings in a personal injury action violated *R.* 1:2-1 due to the high public interest in the accident. Plaintiffs failed to show their privacy concerns outweighed the strong presumption of access to court records). Further, the sealing of court records is only permitted when the matter involves issues of a sensitive nature. *See In re E.F.G.*, 398 N.J. Super. 539, 548-49 (App. Div. 2008) (providing the party seeking to keep records confidential overcame presumption of public access by establishing disclosure of information would put the party in danger).

In *Verni*, *supra,* the court reversed an order to seal documents and proceedings due to the public's right to knowledge regarding the litigation. *Verni, supra*, 404 *N.J. Super.* at 27-29. In that case, an intoxicated driver hit and injured plaintiff after drinking copious amounts of alcohol at a Giants game. *Id.* at 19. Plaintiffs sought to have court records sealed out of fear that plaintiff's abusive and estranged father would try to access the funds obtained in settlement. *Id.* at 25. However, the court felt that the need to keep records confidential did not outweigh the presumption of open judicial proceedings. *Ibid.* Moreover, the Court noted the case presented significant issues of public concern, such as whether the owner and operator of a stadium engaged in practices that encouraged socially irresponsible behavior. *Id.* at 27. In denying the request to seal the records, the *Verni* Court stated:

> Rule 1:2-1 directs that all proceedings in the courts of this State shall be conducted in open court. Pertinent to the issues in this case, the rule provides that no record of any proceeding may be sealed except on a showing of good cause. **This requirement**

> **has its roots in our common law aversion to and distrust of secret trials** . *Sheppard v. Maxwell*, 384 *U.S.* 333, 349-50, 86 *S. Ct.* 1507, 1515 (1966); *Smith v. Smith*, 379 *N.J. Super.* 447, 451 (Ch.Div.2004). Moreover, our Supreme Court has acknowledged that the First Amendment, the history of this State, and our court rules require that civil proceedings shall be open to the public unless "an important state interest is at stake." *N.J. Div. of Youth & Family Servs. v. J.B.*, 120 *N.J.* 112, 127 (1990).
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> . . . .
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> [In Hammock,] [t]he Court proceeded to recognize a "profound public interest when matters of health, safety and consumer fraud are involved" that is independent of the interest of the parties to the litigation. *Id.* at 379. Therefore, a judge must carefully scrutinize an application to seal records or documents "in a high public-interest case." Ibid.

Id. at 21-23 (emphasis added). The party seeking "to overcome the strong presumption of access must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption." *Hammock*, *supra*, 142 *N.J.* at 381. "A personal interest in privacy and freedom from annoyance and harassment, while important to the litigant, will not outweigh the presumption of open judicial proceedings even in relatively uncomplicated and non-notorious civil litigation." *Verni*, *supra*, 404 *N.J. Super.* at 24 (emphasis added) (citing *Zukerman v. Piper Pools, Inc.*, 256 *N.J. Super.* 622, 628-29 (App.Div.), *certif. denied*, 130 *N.J.* 394 (1992)). The jury's verdict in this case should not be sealed.

In this matter, the public's right of access to the jury's verdict is all the more critical given the public safety nature of this public job. This case involved Jacobs' failure to meet its safety management obligations with respect to a Turnpike construction project that impacts the public. Jacobs' duties included making sure workers and members of the motoring public were not killed. Indeed, Jacobs own documents on this job state, "there are many more motorists injured and killed in work zones than workers." (*Exhibit A - Jacob's Document, Work Zone Safety Awareness - It's Our Responsibility*). The case was tried over a four week period. Jacobs continually told everyone it had no responsibility for safety and even used an affidavit and testimony in this regard. They even swore in interrogatories they had no responsibility for safety. All of it was proven false.

This was a public job funded by taxpayer dollars. Jacobs was paid over $17,000,000 to safely manage the job. Jaobs expected to win and wanted to tell the world the jury found it did nothing wrong. But it was not until it lost- the day after the high-low agreement was placed on the record[1]-

[1]When the terms of the high low were placed on the record on November 6, 2019, Jacobs said nothing about wanting the public verdict to be a secret. And indeed there is no such provision in the high-low agreement (which Jacobs drafted and any ambiguities have to be read against the drafter. *Chubb Custom Ins. Co.*, 195 N.J. at 238). It was not until the next day, after the jury found them 100% at fault, that they scrambled to keep it under wraps. There is no basis

that Jacobs made an attempt to keep it "hush hush." It provided no basis for this extraordinary request under the Rules. It has not and cannot show any "clearly defined and serious injury" nor can it show its "interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection." *Rule* 1:38-11. Indeed, to the contrary, the public has a right to know when a public contractor was found to have mismanaged an important safety issue on a highway project like was shown here. Failing to manage safety on a Turnpike job like this jury found places the public at risk. Jacobs' request to hide the truth is abhorrent to the public interest, our court Rules, and case law.

Beyond that, the verdict was read in open Court with members of the public present. In that regard, once the verdict is in the public domain, it cannot be withdrawn. *See Hammock*, *supra* 142 *N.J.* at 384 (quoting *Smith v. BIC Corp.*, 869 *F.2d* 194, 199 (3d Cir. 1989) (holding information that is in the public domain cannot be kept confidential). Furthermore given the public nature of the job and verdict, Jacobs' request would also violate New Jersey's sunshine law known as OPRA. The Open Public Records Act embodies the public policy of New Jersey that:

> Government records shall be readily accessible for inspection, copying, or examination by the citizens of the State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by OPRA shall be construed in favor of the public's right of access.

N.J.S.A. 47:1A-1; *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 543-44 (App Div. 2005). Indeed, New Jersey "has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." *S. Jersey Pub. Co. v. N.J. Expressway Auth.*, 124 *N.J.* 478, 486-87 (1991).

There is no basis for Jacobs' request to hide the truth and seal the verdict. The request should be denied.

II. There Was Never Any Agreement to Make the Verdict Secret, the Request Only Came after Jacobs Lost, and Even If There Were (Which There Was Not), Such Would Not Fit into the Strict Requirements Spelled out in *Rule* 1:38-11

There was never any agreement to keep the jury verdict confidential. On November 5, 2019, Defendants emailed a letter with a settlement offer and terms of a high/low agreement. (*Exhibit B - November 5, 2019 Letter from AIG - Submitted via Lawyer Service only*). On November 6, 2019, Plaintiffs accepted the high/low agreement and this was placed on record almost immediately thereafter. While the parties agreed the terms of the high/low agreement were confidential, there was no agreement the verdict would be kept confidential. If Jacob's had wanted this, it should have

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under the Rules or case law to keep the verdict a secret. The public paid for the job, paid for the jury (which sat for 4 weeks), and paid for the verdict. It has a right to know. *Rule* 1:2-1; 1:38-11.

unequivocally stated so in their settlement letter. They did not. Instead, the terms agreed to by the parties relative to the high-low agreement state, "[t]erms of this agreement are confidential[.]" (emphasis added).

Plaintiff agrees the letter states the specific terms of the high-low agreement are supposed to be confidential. There is clearly no agreement the jury verdict is to be made secret. This is especially so where it was read in open court with members of the public sitting in. Moreover, any discrepancy regarding the interpretation of this line is to be read in favor of the non-drafting party. *Chubb Custom Ins. Co. v. Prudential Ins. Co. of America* , 195 N.J. 231, 238 (2008) (providing where a word or phrase is ambiguous, a court should adopt the meaning that is most favorable to the non-drafting party). The Court should not make a better deal than Jacobs negotiated. *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421, 428 (App. Div. 2004) ("the court cannot make a better contract for parties than the one that they themselves agreed to.") (citing *Stone v. Royal Ins. Co.*, 211 N.J. Super. 217, 222-23 (App. Div. 1974)). Jacob's simply fails to meet the strict requirements of *R.* 1:38-11(b) and the verdict should not be sealed.

Accordingly, there is no basis to seal this jury verdict, which was read in open court, and involved matters of public safety on a public job, funded by taxpayers. The verdict should not be sealed and should be part of the public domain like virtually every other civil verdict. Comprehensive research has shown there has never before been a public verdict, announced in open court with members of the public sitting in, somehow made a secret after the fact. Such is entirely unheard of and extraordinary. There was simply never any basis for that request which violates basic Court Rules and law and a longstanding tradition of openness of public proceedings.

We enclose herewith an alternative form of Order which we request the Court enter.

Respectfully submitted,

MARK W. MORRIS
For the firm

MWM:bhs

cc: Timothy Saia, Esq. (Via Electronic Filing & Lawyer Service w/ Attachments)

Ltr to Court Re Sealing of the Verdict3.wpd

EXHIBIT "A"

JACOBS

Safety Moment

Work Zone Safety Awareness – It's Our Responsibility

Week of April 4, 2014, was Work Zone Safety Awareness Week. We need to take time to remember those we have lost, to review the things that we know are working, and some things that we need to work on. Though we continue to improve on our work zones, many lives are still lost each year.

As responders, we don't always think of traffic incident management areas as work zones. These incident areas are work zones; they are just shorter in duration than the construction and maintenance zones that we are familiar with. We know that it is safer for our personnel, and for motorists, when the proper traffic control is provided for work zones. Traffic control that is clear to motorists and provides direction; and traffic control that should be the standard for all work zones. We know that motorists make better decisions when we provide them with clear direction, and when we provide this information to them early.

One of the most important components of work zones is advance warning. The SHRP2 National TIM Responder Training reinforces that advance warning should be a high priority for responders, as it lets motorists know that they are approaching an incident before they are on top of it. However, we struggle to provide advance warning at all incidents. Many times this is because we don't have the personnel available to set up advance warning, sometimes the resources are not immediately available, and other times it is overlooked. The lack of advance warning can be directly related to secondary crashes in our TIM areas. No construction or maintenance work zone would be approved without the advance warning component. **Advance warning has to become as important to us, as responders, as it is in a construction or maintenance work zone.**

The theme for Work Zone Safety Awareness Week this year is "Work Zone Speeding – A Costly Mistake". Motorists continue to travel at high speeds, often above the normal posted speed limits, in work zones. There is little room for error, or for correction, in a work zone or TIM area. Our personnel are working in areas that are not physically protected from passing traffic. Often they are working with nothing more than cones or channelizers between them and the traffic. We must rely on the traffic control to provide adequate warning and direction. We must also rely on each other as we work in this inherently dangerous environment.

In an ideal world, we would always have everything in place to protect our personnel as they work at incidents on the highways. Unfortunately, we will never work in that ideal world. As we continue to train responders to safely work at incidents on the highways, we need to emphasize the need for proper traffic control. The SHRP2 National TIM Responder Training reminds us that TIM areas should always include the Advance Warning Area, the Transition Area, the Buffer Zone, the Incident Area, and the Termination Area. Proper traffic control, including these components, will help us to protect our personnel while they work in this dangerous environment. It must become the standard for TIM areas. It will help to provide clear direction to motorists as they travel through the short duration work zones that are TIM areas.

There are many more motorists injured and killed in work zones than workers. If you have had a friend or co-worker injured or killed, this is little consolation. We need to make our work zones and TIM areas as safe as we can for our personnel. Even one injury or death is too many. As a friend has told me many times, when a responder is injured or killed in a work zone, we have failed them. We need to do all that we can to protect each other. We need to make sure that we all go home at the end of the day, in much the same condition that we came to work in.

Remember, "Work Zone Safety, It's Our Responsibility".

Prior to recently transitioning to the consultant side of TIM, Rusty served as the Incident Management Coordinator for KC Scout, the traffic management system in Kansas City. Rusty is currently a trainer for the national SHRP2 TIM Responder Training. With 38 years of experience, and an extensive law enforcement background, Rusty is considered an expert in the fields of TIM and work zone safety.